Whither the Role of Conference Committees: An Analysis

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Summary

Conference committees have long been known as the "third house of Congress." They are often the principal forum for resolving bicameral differences on major measures when the House and Senate pass dissimilar versions of the same bills. Current developments suggest, however, that the "third house" characterization might require modification. It is not that conference committees are unimportant, it is that another method for adjusting and reconciling bicameral differences on significant legislation has taken on greater prominence in the contemporary Congress. This method is the exchange of amendments between the houses—the so-called "ping pong" method.

If the conference committee is being somewhat eclipsed by the ping pong procedure as a way to achieve bicameral reconciliation on consequential measures, that would represent an important institutional development. This apparent development requires attention and analysis. Accordingly, this report's purposes are fundamentally twofold: to examine the reasons for the heightened salience of the ping pong approach and to consider several implications that seem to flow from using this procedure rather than convening conferences to resolve inter-chamber disagreements on major legislation.

To fulfill these two purposes, the report will examine six issues. First, it will provide an overview of the methods Congress employs to achieve bicameral agreement on legislation. Second, it will briefly discuss how each chamber gets to conference, underscoring how the convening of conferences in the Senate can be effectively blocked, even if a majority of Senators would agree to send the measure to conference. Third, it will examine several factors that have apparently contributed to the more conspicuous use of the ping pong method on significant measures.

Fourth, procedures are usually not isolated actions; they are employed in a policy, political, and legislative context. Hence, the report will use three case examples to illustrate in a concrete setting the factors that might trigger use of ping ponging over the convening of conference committees. Fifth, the report will discuss several reasons for, and implications of, ping ponging amendments back-and-forth between the chambers instead of forming conference committees to achieve bicameral agreement on legislation. Lastly, summary observations will be presented, including why the exchange of amendment pattern has seemingly evolved to become a more important feature of bicameral lawmaking activity.

This report will be updated if circumstances warrant such action.

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Introduction

Conference committees have long been known as "the third house of Congress." In a bicameral legislature like the U.S. Congress, they are usually the principal forum for reconciling major bills passed in dissimilar form by the two houses. These bicameral units often write the final version of major measures that both chambers will vote upon. As one Senator said, conferences are "where the final touches are put on legislation which constitutes the laws of the country."[1] A House member stated, "Let's face it, the conference committee is where it all happens."[2] Or as a congressional scholar put it, in "the legislative process, all roads lead to the conference committee."[3]

Current developments suggest, however, that the "third house" characterization might require modification. It is not that conference committees are unimportant, it is that another method for adjusting and reconciling bicameral differences on significant legislation has taken on greater prominence in the contemporary Congress. This method is the exchange of amendments—or "messages"[4]—between the houses, the so-called "ping pong" procedure. Some lawmakers even state that conferences are becoming a thing of the past. A member of the Senate noted, "Processing bills by exchanging messages [amendments] with the House is becoming the norm rather than the exception. Formal conferences are becoming rare."[5]

If the conference committee is being somewhat eclipsed by the ping pong procedure as an important way to achieve bicameral reconciliation on consequential legislation, that would represent an important institutional change. This apparent development merits some attention and analysis. Accordingly, this report's purposes are fundamentally twofold: to examine the reasons for the heightened salience of the ping pong approach and to consider several reasons for and the implications that seem to flow from using this procedure rather than convening conferences to resolve inter-chamber disagreements on major legislation.

To fulfill these two purposes, the report is organized into six sections as follows. First, it will provide an overview of the methods Congress employs to achieve inter-chamber agreement on legislation, including ping pong's place in the bicameral resolution process. Second, it will briefly

[1] *Congressional Record*, vol. 146, October 13, 2000, p. S10520.

[2] Janet Hook, "In Conference: New Hurdles, Hard Bargaining," *Congressional Quarterly Weekly Report*, September 6, 1986, p. 2082.

[3] John Manley, *The Politics of Finance: The House Committee on Ways and Means* (Boston, Little, Brown, 1970), p. 239.

[4] According to Senate precedents addressing messages from the House: "If the messages involve Senate-passed bills with House amendments or House-passed bills with Senate amendments, or Senate amendments with House amendments thereto, they are held at the Desk [in the chamber] until a request from the floor is made to dispose of them. Generally, when a request is made from the floor to lay such messages before the Senate, the Senate will concur in the House amendments, or concur in the House amendments with amendments, or send such bills which have passed both Houses with amendments to conference." Regarding measures passed by both houses, Senate precedents also state: "Messages from the House of Representatives on measures which have already passed the Senate and the House of Representatives with amendments, when received in the Senate, are held at the desk for further disposition. Generally, such proposals, which have privileged status to be laid before the Senate [meaning a motion to call them up is not subject to a filibuster], are either sent to conference, or a motion is made to concur in the House amendments thereto." See Floyd M. Riddick and Alan S. Frumin, *Senate Procedure: Precedents and Practices* (Washington., DC: GPO, 1992), p. 1515. For pertinent House precedents regarding amendments between the houses, see Wm. Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington, DC: GPO, 2003).

[5] *Congressional Record*, vol. 154, April 24, 2008, p. S3387.

discuss how each chamber gets to conference, underscoring how the convening of conference committees in the Senate can be effectively blocked, even if a majority of Senators would agree to send the measure to conference. Third, it will examine why there seems to be more reliance in recent years on the ping pong method in reconciling bicameral differences on significant legislation than on the conference committee route.

Important to underscore at the outset is that informal negotiations among key bicameral actors suffuse the lawmaking process. Unsurprisingly, confidential bargaining to achieve mutually acceptable agreements is part and parcel of both the conference committee and the amendment exchange procedure. Key bicameral actors typically craft policy compromises in closed session and then use the amendment exchange method to win House-Senate agreement on them.[6] On Capitol Hill, private negotiating sessions and discussions among House and Senate members are a day-to-day occurrence; these confidential meetings influence lawmaking from the introduction of a bill to bicameral reconciliation.

Procedures usually are not isolated actions; they are employed in a policy, political, and legislative context. Hence, the fourth section of the report provides an overview of three case examples to illustrate in a concrete setting the factors that may trigger use of ping ponging over the convening of conference committees. The three measures are the Energy Independence and Security Act (H.R. 6); the Honest Leadership and Open Government Act (S. 1); and the reauthorization of the State Children's Health Insurance Program (or SCHIP, H.R. 976). A brief summary of the key elements associated with ping ponging each bill will conclude the discussion. These three bills were selected because they were the only ones in 2007 where the Senate majority leader employed a strategic maneuver called "filling the amendment tree" during the bicameral resolution stage.[7] This procedural device is a way for the majority leader to protect an informally negotiated bicameral compromise from amendment.

To be sure, there are other significant measures where ping ponging without any tree-filling has occurred in the Senate. The tree-filling maneuver may not have been necessary or appropriate because, for example, the bicameral compromise enjoyed broad bipartisan support; tree-filling might create more legislative problems than it could solve, such as arousing the ire of lawmakers who wanted to offer amendments of their own; or deadline pressures prompted agreement to the bicameral accord. Still, tree-filling can sometimes be a useful procedure in facilitating passage of priority legislation, which is why these measures were chosen for examination.

Fifth, the report will discuss several reasons for, and implications of, ping ponging amendments back-and-forth between the chambers instead of forming conference committees to achieve bicameral agreement on legislation. Lastly, summary observations will be presented, including why the exchange of amendment pattern has seemingly evolved to become a more important feature of bicameral lawmaking activity.

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[6] Bicameral participants might also convene a perfunctory conference committee to ratify decisions made during closed bargaining sessions.

[7] An amendment "tree" is a chart or diagram that, among other things, shows the number and types of amendments that may be pending to a measure or matter before any amendment is voted upon. There are a maximum number of amendments permitted by a particular chart or diagram (i.e., the tree), and once that number is reached, the tree is "filled." After that, no further amendments are in order until one of the so-called "limbs" (or amendments) on the tree is disposed of. The Senate majority leader is able to fill the tree rather easily, because he is granted preferential recognition by the Senate's presiding officer. The result: the majority leader is recognized by the presiding officer to propose amendments back-to-back until a tree is filled. Worth a brief mention is that the 110th Senate has reportedly witnessed more tree-filling than in any other recent Congress. See *Congressional Record*, vol. 154, May 6, 2008, pp. S 3754-S3757.

Achieving "Bicameral Ignition" on Legislation

Under the Constitution, before measures can be sent to the White House for presidential consideration, they must pass the House and Senate with exactly the same bill number and legislative text. The issue, then, is how to unite what the Constitution divides when one chamber agrees to a measure at variance with a comparable bill adopted by the other house? Although the Constitution is silent on the matter, Congress has devised three basic methods or procedures to achieve "bicameral ignition."

First, one house enacts unchanged the other's bill. Most measures (anywhere from 63 to around 85 percent in a biennial Congress) are enacted into law when one chamber adopts verbatim the legislation received from the other body. One chamber's deference to the other house's bill has various explanations, ranging from the lack of controversy to political necessity because time is running out in a legislative session. The hike over time in the percentage of measures "rubber stamped" into enactment (see **Table 1**) probably reflects a number of factors (setting aside their noncontroversial character), such as Members' electoral imperative—the urge felt by many to claim credit for passing constituency-focused legislation—and the artful drafting of legislation to assure that it has broad bipartisan and bicameral appeal. To be sure, House and Senate members and their staff aides often consult informally prior to a bill's introduction in either chamber to facilitate its approval by the second-acting house without amendment.

The other two methods specifically deal with reconciling bicameral differences when the two chambers pass different versions of the same bill. The House and Senate can message—or "ping pong"—amendments back-and-forth between them until substantive disagreements on a measure are worked out. With the ping pong—or exchange of amendments—approach, one chamber may adopt the other house's amendments or further modify the other's amendments until both finally agree to identical language for all the provisions of the legislation.[8] As a legislative scholar explained:

> When the House or Senate passes a measure, it is sent to the other chamber for further consideration. If the second chamber passes the measure with one or more amendments, it is then sent back to the originating chamber. In modern practice, the second chamber typically substitutes its version of a measure as a single amendment to the measure as passed by the first chamber. The first chamber then may accept the amendment or propose its own further amendment. In this way, the measure may be messaged back and forth between the House and Senate in the hope that both houses will eventually agree to the same version of a measure.[9]

The ping pong method of bicameral reconciliation is "frequently used in the closing days of a Congress to save time," wrote a congressional journalist. "Bills may be sent back and forth on an hourly basis until there is a meeting of the minds, or one side backs down, or the two chambers give up in failure."[10] A week before Christmas 2007, for example, the House and Senate agreed to enact the Consolidated Appropriations Act for Fiscal Year 2008 (H.R. 2764). With Congress unable to enact 11 of 12 appropriations bills by the start of the new fiscal year (October 1, 2007)—largely because of sharp conflicts over spending priorities between congressional Democrats and President Bush, as well as with congressional Republicans—the two chambers opted to use the ping pong route. Given clashes between Democrats and Republicans and

[8] There is a technical limit to the number of times measures can be shuffled between the chambers. The third-degree amendment prohibition—amendments to amendments to amendments are not in order—applies to amendments between the House and Senate. This parliamentary principle can be set aside if either chamber wants to do so.

[9] CRS Report 98-812, *Amendments Between the Houses*, by Elizabeth Rybicki.

[10] Richard Cohen, *National Journal*, July 28, 2001, p. 2396.

lawmakers anxious to depart for the holiday season, political and temporal considerations were among the factors that prompted use of the amendment exchange method as the preferred way to reconcile inter-chamber differences on H.R. 2764.

Roughly 11% to 24% of public laws enacted during recent biennial Congresses took the ping pong, or "amendments between the houses," route. The 12% figure for the 2005-2007 period, as indicated by **Table 1**, represents a 50% decline from the 103rd Congress (1993-1995). However, the numerical dropoff does not reflect the higher policy significance of the legislation subject to the ping pong method in recent years compared with earlier Congresses.

Table 1. Methods of Bicameral Resolution on Public Laws, 1992-2007

Congress	Public Laws	Simple adoption by one chamber of the version sent to it by the other	Amendments between the houses	Conference[a]
103rd (1993-1994)	465	291 (63%)	112 (24%)	62 (13%)
104th (1995-1996)	333	234 (70%)	55 (17%)	44 (13%)
105th (1997-1998)	394	278 (71%)	77 (20%)	39 (10%)
106th (1999-2000)	580	436 (75%)	106 (18%)	38 (7%)
107th (2001-2002)	377	289 (77%)	55 (15%)	33 (9%)
108th (2003-2004)	498	406 (82%)	57 (11%)	35 (7%)
109th (2005-2006)	482	396 (82%)	60 (12%)	26 (5%)
110th, 1st (2007)	180	153 (85%)	21 (12%)	6 (3%)

Sources: Data compiled by CRS analysts from the *House Final Calendars*. Data from the first session of the 110th Congress are from the Legislative Information System (LIS).

a. If both chambers appointed conferees, the measure was included in the count of conference committee, even if some differences were resolved through amendment exchange.

Bicameral ignition may also occur when the House and Senate agree to establish a conference committee. Each chamber selects a number of conferees from the relevant committees of jurisdiction to reconcile the items in bicameral disagreement. Only a relatively small number of public laws passed by a Congress (anywhere from around 5% to 13%, as revealed in **Table 1**) reach the conference stage, but these are often the most complex, controversial, and consequential. On some occasions a combination of the two approaches—ping pong and a conference committee, or vice versa—will be employed to reconcile matters in bicameral disagreement.[11] For example, the chambers may start out using the ping pong procedure but then convene a conference committee to reconcile outstanding disagreements.

[11] Until the mid-1990s, conferences on appropriations bills virtually always reported a number of discrete amendments in disagreement. By long-standing practice, the House initiates appropriations bills, and the Senate would then adopt a series of amendments to the House-passed measure. Appropriations conferences would report a partial conference report to their respective chambers, which would be agreed to. Then each chamber would consider the amendments still in disagreement, which reflected either true (a policy clash) or technical (a rule violation, for example) differences. Thus, appropriations conferences often observed a two-step process: the House would first agree to a partial conference report and then address the amendments in disagreement; both matters would then be sent to the Senate, which would first adopt the partial conference report and then consider the amendments in disagreement forwarded to it by the House. This practice stopped after Republicans captured control of Congress in November 1994. No longer does the Senate adopt discrete amendments to House-passed appropriations bills. Instead, the Senate Appropriations Committee follows the practice of other standing committees by striking the entire text of the House-passed bill and replacing it with a complete substitute (the Senate's version of the money bill). One reason for the change was to expedite

It is quite common for House and Senate committee and party leaders, along with relevant staff, to conduct private, pre-conference negotiations prior to the formal convening of a conference. These might be characterized as "virtual" conferences. For example, meeting behind closed doors, "Senate and House leaders are taking the unusual step of negotiating a final bill to address the nation's housing crisis even before the Senate adopts its own version, trying to short-circuit a legislative process that might otherwise drag well into the summer."[12] In these cases, sometimes the creation of a conference committee "will be more an indication that a deal is done than a forum to find one."[13]

Private negotiating sessions also occur regularly, as noted earlier, with the exchange of amendment procedure. For example, confidential negotiations occurred when the House passed a genetic nondiscrimination measure (H.R. 493) on April 25, 2007, which the Senate considered the following year (April 24). The Senate replaced the language in H.R. 493 with a complete substitute and returned the bill, as amended, to the House, where it was cleared on May 1 for presidential consideration. The point is that the Senate's complete substitute was the result of informal bicameral negotiations. As the ranking Senator on the relevant committee of jurisdiction stated a few days before the House approved the substitute: "It has even been preconferenced with the House side. So we are pretty sure that once it finishes here it will go right over to the House and the House will take care of it too.... We let them into the process early so that everybody would know what was happening."[14]

Ping Ponging in the Spotlight

Recently, legislative analysts and others have noted an increase in the use of the exchange of amendment procedure for bicameral reconciliation. Difficulties in creating conference committees for several major bills elevated the ping pong procedure to greater prominence in resolving inter-chamber differences on legislation. As former Senate Parliamentarian Robert Dove stated, "There's no question that amendments between the houses has been used more [today] than it has in the past, but that's because Senators blocking [legislation] from going to conference has happened more often."[15] A congressional scholar and former House staff director calculated the extent to which major bills were resolved by establishing conference committees or using the ping pong approach during equivalent periods of the GOP-controlled 109th Congress (2005-2007) and the Democratically controlled 110th Congress (2007-2009). His study determined:

> Of major bills approved by the House and Senate that required some action to resolve differences between the two versions, 11 out of 19 (58 percent) were settled by conferences in the current Congress compared with 18 out of 19 (95 percent) in the previous Congress.

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congressional action on appropriations measures. Another explanation for the change was the increasing willingness of the House Rules Committee to issue special rules granting a blanket waiver of points of order against conference reports. As a result, considering Senate amendments in disagreement outside the formal conference report because they violated various procedural rules was no longer necessary. For additional relevant material, see CRS Report 98-813, *Amendments in Disagreement*, by James V. Saturno.

[12] Jeffrey H. Birnbaum, "Lawmakers Seek Shortcut In Negotiating House Bill," *The Washington Post*, June 7, 2008, p. D1.

[13] Gary Andres, "A Deal or No Deal," *The Washington Times*, June 8, 2006, p. A19.

[14] *Congressional Record*, vol. 154, April 23, 2008, p. S3300.

[15] Emily Pierce and Jennifer Yachnin, "Tactical Skirmishes Intensified in 110th Congress," *Roll Call*, January 22, 2008, p. B-16.

> Put another way, the current 110th Congress has been negotiating eight times as many bills as the 109th Congress outside the conference process. This is done by using the "pingpong" approach of bouncing amendments between the houses until a final agreement is achieved.[16]

In short, the current reality is that major bills often cannot reach the conference stage, leaving informal negotiations and "amendments between the houses" as the alternative methods for resolving bicameral differences on major legislation.

Getting to Conference: House and Senate Procedure

House

Briefly, the two most-used methods for getting to conference are unanimous consent, with House Rule XXII available if an objection is made, and special rules from the Rules Committee.

A routine request is for a lawmaker to ask and receive unanimous consent to go to conference on a measure. "Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill H.R. 1234 with the Senate amendments thereto, disagree to the amendments of the Senate, and ask for a conference with the Senate."[17] (Members request unanimous consent because Senate amendments at this stage of the proceedings are not "privileged"—meaning they cannot be called up "at practically any time for immediate consideration when no other business is pending.")[18] If a lawmaker objects, the Member who requested unanimous consent could then invoke clause 1 of House Rule XXII. This rule permits legislation to reach conference by majority vote of the House if a member of the committee(s) of original jurisdiction, typically the chair, is authorized by his or her panel to offer the following motion:[19] "Mr. Speaker, by direction of the Committee on ____, I move to take from the Speaker's table the bill H.R. 1234, with a Senate amendment thereto, disagree to the Senate amendment, and ask for [or agree to] a conference with the Senate."

Second, the Rules Committee can report a special rule sending a measure to conference. This procedural resolution requires a majority vote of the House for adoption. The special rule would contain language such as: "That upon the adoption of this resolution it shall be in order to take from the Speaker's table the bill (H.R. 1234), with the Senate amendment thereto, disagree to the Senate amendment and ask for a conference with the Senate." Special rules are privileged, debated under the hour rule, and cannot be amended unless the "previous question"—a motion

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[16] Don Wolfensberger, "Have House-Senate Conferences Gone The Way of the Dodo?" *Roll Call,* April 28, 2008, p. 8.

[17] Typically, a House bill with Senate amendments is held at the Speaker's "desk." Since Senate amendments at this stage are not "privileged"—meaning they have no right-of-way to the floor—some other way is required to dispose of them if a lawmaker objects to a unanimous consent request to take them up. For a detailed study of resolving bicameral differences, see CRS Report 98-696, *Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses*, by Elizabeth Rybicki.

[18] John V. Sullivan, *How Our Laws Are Made* (Washington, DC: GPO, 2007), p. 25. Precedents state that "motions in the House to dispose of the [Senate] amendment are not privileged and require unanimous consent or a special rule from the Committee on Rules, the only exception being a motion to ask or agree to a conference under rule XXII clause 1." See Wm. Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington, DC: GPO, 2003), p. 841.

[19] More specifically, House Rule XXII, clause 1 states: "A motion to disagree to Senate amendments to a House proposition and to request or agree to a conference with the Senate, or a motion to insist on House amendments to a Senate proposition and to request or agree to a conference with the Senate, shall be privileged in the discretion of the Speaker if offered by direction of the primary committee and of all reporting committees that had initial referral of the proposition."

that, if agreed to, ends debate and requires a vote on the pending matter (the special rule)—is rejected. Rarely is the previous question motion defeated by vote of the House members.

Simply put, the House is an institution whose formal rules and precedents emphasize "majority rule." Requests to go to conference are difficult to reject, because they are typically framed as "party-line" votes by majority party leaders. Seldom, for example, are special rules or Rule XXII motions turned down by the House.

An infrequently used procedure to get to conference is suspension of the rules, a motion that requires a two-thirds vote for approval. A Member will say, "Mr. Speaker, I move to suspend the rules and take from the Speaker's table the bill H.R. 1234 with the Senate amendments thereto, disagree to the amendments of the Senate, and ask for a conference with the Senate." The supermajority vote limits use of the suspension procedure as a method for getting to conference.

Senate

Unlike the "majority rule" principle of the House, the Senate is a "minority rule" institution. Its rules and precedents grant large parliamentary prerogatives to each senator, such as the right of extended debate. As one senator exclaimed: "The only thing [that] it's easy to do in the Senate is slow things down. The Senate is 100 human brake pads."[20] Slowing the Senate down can occur even if a Senator merely threatens to filibuster a measure or matter. In today's Senate, there is often neither the time nor the votes to terminate dilatory debate, or a filibuster; so a talkathon threat is sometimes enough to prevent action on legislation. A three-fifths vote of the entire membership (if no vacancies, 60 of 100 senators), as prescribed in Senate Rule XXII, is required to end a filibuster. If the Senate is narrowly divided and ideologically polarized, it is often impossible to attract the 60 votes.

To convene a conference, it is generally the case that the majority leader or the majority floor manager will ask and receive unanimous consent when he/she makes this request: "Mr. President, I ask unanimous consent that the Senate insist on its amendments [or disagree to the House amendments to the Senate bill], request a conference with the House on the disagreeing votes thereon, and that the Chair be authorized to appoint conferees." Notice that there are three distinguishable parts to this request: insist (or disagree), request, and authorize the appointment of conferees. If a lawmaker objects to the unanimous consent request, then the majority leader or floor manager would have to move each step separately, and each motion is subject to extended debate.

As former Senate Parliamentarian Dove noted: "The three steps are usually bundled into a unanimous consent agreement and done within seconds. But if some senators do not want a conference to occur and if they are determined, they can force three separate cloture votes to close debate and that takes time. It basically stops the whole process of going to conference."[21] And if cloture (closure of debate) as outlined in Rule XXII were invoked on each part, Senators keen on preventing a conference still could offer innumerable motions to instruct conferees (who are yet to be officially named by the Senate)—and each instruction motion is subject to a filibuster.[22]

[20] Associated Press, "Democrats to Forgo Control in Brief Edge," *The Washington Times,* November 29, 2000, p. A4.

[21] Carl Hulse and Robert Pear, "Feeling Left Out on Major Bills, Democrats Turn to Stalling Others," *New York Times,* May 3, 2004, p. A8.

[22] For more information, see CRS Report RS20454, *Going to Conference in the Senate,* by Elizabeth Rybicki.

The Senate's Difficulty in Convening Conferences

A number of commonly occurring factors explains why the Senate sometimes experiences delay or difficulty in getting to conference. For example, Senate (and House) leaders—who want or expect to go to conference—may delay the appointment of conferees, because there is a dispute over conferee selection: the number to be chosen and the party ratio. At issue in these cases might be concern over the representation of diverse views in conference. Limiting the size of the conference delegation could block certain lawmakers from serving on the conference committee. Conversely, increasing the number of conferees could ensure that certain Members would serve on the conference committee. Party leaders, too, may want to conduct informal pre-conference negotiations with the White House (or House) before the Senate officially names conferees. Delay in forming a conference may be a tactic to pressure the other body to concede on certain policies in bicameral disagreement. Or delay might be a form of "hostage politics:" the naming of conferees on a certain bill will not occur until the other body appoints conferees on a different measure in bicameral dispute.

Three other overlapping reasons, however, largely account for the contemporary Senate's difficulty in convening conferences. Each merits additional discussion. They are the Senate's tradition of extended debate (the filibuster); the polarization that characterizes the modern Senate; and the exclusion of minority party conferees from participating in the bicameral bargaining process.

Senators and Extended Debate

The reality or threat of extended debate has long been part of the Senate. So why has it now come into relatively recent prominence as a blocking tactic with respect to the convening of conferences—thus focusing more emphasis on the ping pong method? Part of the answer is the rise of the "individualist" Senate. Congressional scholars state that Senators today take for "granted that they—and their colleagues—[will] regularly exploit the powers the Senate rules [give] them. [They are] increasingly outward directed, focusing on their links with interest groups, policy communities, and the media more than on their ties to one another."[23] Internal incentives to employ extended debate sparingly have given way to other incentives (requests by outside groups to engage in dilatory actions on certain measures, for example) that encourage lawmakers to push their own agendas even if the Senate's lawmaking activities might grind to a halt. Another part (discussed below) deals with the polarization—intense partisan and policy conflict—that characterizes Senate deliberations involving each party's priority issues.

Filibustering the Senate's three-part request to go to conference with the House is of recent vintage. The first major instance of this delaying action, so far as is known, occurred during the closing days of the 103rd Congress (1993-1995). It happened on a campaign finance reform proposal. With Congress slated to adjourn by October 7, 1994, critics of a campaign reform plan launched their precedent-establishing filibuster the week of September 19. The opponents objected to the routine motion to convene a conference on the campaign reform bill (S. 3) and the House amendments thereto. As a Senate proponent of S. 3 stated:

> We attempted to move to conference just prior to the August [1994] recess, but that request was objected to by one of our colleagues. Under the rules of the Senate, the motion to disagree with the amendments of the House to a Senate bill, as well as a request for a

[23] Barbara Sinclair, "The New World of U.S. Senators," in Lawrence C. Dodd and Bruce I. Oppenheimer, eds., *Congress Reconsidered*, 8th ed. (Washington, DC: CQ Press, 2005), p. 2.

> conference and the appointment of conferees, are debatable motions. We have been unable to obtain unanimous consent on this issue.... [24]

On September 22, the Senate voted 96 to 2 vote to invoke cloture on the motion to *disagree* to the House amendments to S. 3. In a strategic move, campaign reform opponents opted to vote for cloture to "run out the clock." Under Rule XXII, if cloture is invoked, 30 more hours of debate are permitted, a parliamentary right which is usually exercised infrequently. In this case, however, opponents of S. 3 "used every minute, talking straight through the night and through most of Sept. 23 before the Senate voted 93-0 to disagree with the House."[25] Seven days later the Senate failed (52 to 46) to invoke cloture on the motion to *request* a conference and the bill died. The Senate's majority leader (Democrat George Mitchell of Maine) declared: "In the 210 years in the history of the United States Senate, never—until last week—has there been a series of filibusters on taking a bill to conference."[26]

Polarization

Growing partisan tensions in the Senate are a major factor triggering dilatory activity that can prevent the convening of conference committees.[27] In addition, the Senate is filled with lawmakers willing to exploit the chamber's procedural rules to accomplish their objectives. Mitchell's service as majority leader (1989 to 1995) occurred during a time when the Senate—long known for comity among its members and the willingness of senators to compromise and resolve policy differences—was becoming a more polarized and partisan institution. Various

[24] *Congressional Record*, vol. 140, September 21, 1994, p. 25031.

[25] Beth Donovan, "Republicans Plan Filibusters, Imperiling Senate Schedule," *Congressional Quarterly Weekly Report*, September 24, 1994, p. 2655.

[26] Ceci Connolly, "Legislation Goes Overboard as Legislators Eye Exits," *Congressional Quarterly Weekly Report*, October 1, 1994, p. 2755. There were several earlier instances of somewhat comparable delays in getting to conference. For example, on September 15, 1992, the majority leader lamented that the Senate had to invoke cloture in order to proceed to conference with the House on the Neighborhood Schools Improvement Act (S. 2). Cloture was successfully invoked (85 to 6) on the motion to disagree to the House amendments to S. 2. "It is extraordinary that the Senate should be required to go through this procedure," exclaimed the majority leader, "and then even more extraordinary that not a single word has been stated publicly as to why the Senate is being required to go through this procedure" on a bill that passed the Senate by a 92 to 6 vote. See *Congressional Record*, vol. 138, September 15, 1992, p. S13442. On July 20, 1993, the majority leader asked unanimous consent that the Senate agree to the three-part motion to go to conference with the House on the Hatch Act Reform Amendments (H.R. 20). A senator objected to that request. In response, the majority leader stated: "Sixty-eight Senators voted to pass [H.R. 20], and now what is as routine a request as there can be in the Senate, simply to name Senators to meet with House colleagues to work on a conference on the bill, we have a filibuster, or threat of a filibuster, that prevents us from taking action unless we now drop everything else, file a nemotion to end the filibuster and spend a few more days on a bill which we have already debated and discussed at length and just voted for by an overwhelming margin." See *Congressional Record*, vol. 139, July 20, 1993, p. S8955. On the California Desert Protection Act (S. 21), a senator "slowed the usually pro forma step of sending the bill to conference." On September 22, 1994, the Senate voted 73 to 20 to invoke cloture on the motion to disagree to the House amendments to S. 21. Subsequently, on October 4, 1994, the majority leader reached an agreement with opponents of the bill to send the measure to conference. He asked and received unanimous consent "that the Senate request a conference with the House on the disagreeing votes of the two Houses, and that the Chair be authorized to appoint conferees." See *Congressional Record*, vol. 140, September 22, 1004, p. 25454 and October 4, 1994, p. 27482.

[27] One notion of "partisan" involves the electoral competitiveness and intensity of views between the two parties that sometimes inhibits their ability to work together effectively to resolve major issues. As a result, in the contemporary Congress, there is a tendency for "civility to lose out to conflict, compromise to deadlock, deliberation to sound bites, and legislative product to campaign issues." See David Brady and Morris Fiorina, "Congress in the Era of the Permanent Campaign," in Norman J. Ornstein and Thomas E. Mann, eds., *The Permanent Campaign and Its Future* (Washington, D.C.: American Enterprise Institute and The Brookings Institution, 2000), p. 156.

long- and short-term developments produced this result; they have been analyzed and discussed in numerous sources, but several merit mention.[28]

Heightened partisan feelings between Democrats and Republicans are due in large measure to a significant demographic development. A national resorting of the two parties' constituency bases has produced large policy differences between them. For instance, the South was once a Democratic bastion. Today, it is largely a Republican stronghold as conservative Democrats became conservative Republicans.[29] The outcome, as journalist David S. Broder wrote, is two Senate parties "more cohesive internally and further apart from each other philosophically."[30] Or as a GOP senator put it: "Today, most Democrats are far left; most Republicans are to the right; and there are very few in between."[31] Little surprise, therefore, that we see a large number of party-line votes (a majority of one party facing off against a majority of the other party) and an increase in party cohesion on those votes. "Both Republicans and Democrats are standing with their own party against the other on about 90 percent of the [contested] votes, a level of lockstep uniformity unimaginable only a generation or two ago."[32]

Among other factors contributing to sharper partisanship in the Senate are the following:

- a 24/7 news cycle that focuses on party conflict and scandal;
- interest groups aligned with each party that expect lawmakers to toe-the-line on their preferred issues or face electoral recriminations;
- lawmakers' constant need to raise campaign funds from many of these same party-aligned groups that often closely monitor the votes of lawmakers;
- the influx of former House members into the Senate, many of whom bring a more confrontational governing style to the chamber;
- the reality of top party leaders being targeted by opposition Senators for electoral defeat;
- the use of ethics as a partisan weapon; and
- today's often negative "take-no-prisoners" senatorial elections.

These many elements combine to make management of today's Senate difficult, especially on controversial issues and when the partisan divide is narrow. "There [is] nothing here [the majority

[28] See, for example, Ronald Brownstein, *The Second Civil War: How Extreme Partisanship Has Paralyzed Washington and Polarized America* (New York: The Penguin Press, 2007); Jon Bond and Richard Fleisher, eds., *Polarized Politics: Congress and the President in a Partisan Era* (Washington, DC: CQ Press, 2000); and Barbara Sinclair, "The New World of U.S. Senators," in Lawrence C. Dodd and Bruce I. Oppenheimer, eds., *Congress Reconsidered*, 8th ed. (Washington, DC: CQ Press, 2005), pp. 1-22.

[29] There are various explanations to account for the rise of the two-party South. Some emphasize the role of the civil rights movement in promoting the registration of black voters, which encouraged conservatives to leave the Democratic party and become Republicans. Others point to migration of prosperous retirees, many of them Republican, from northern states to the South. See Nelson W. Polsby, *How Congress Evolves: Social Bases of Institutional Change* (New York: Oxford University Press, 2004), pp. 80-108. Further, there are traditional and historical southern cultural characteristics that might have facilitated the region's drift toward the Republican party, such as its large number of white evangelicals, lack of strong unions, and deep-seated support of the military.

[30] David S. Broder, "Don't Bet on Bipartisan Niceties," *The Washington Post*, January 1, 2002, p. A19.

[31] Kathy Kiely and Wendy Koch, "Committee Shaped by Party Ties," *USA Today*, October 5, 1998, p. 2A.

[32] Brownstein, *The Second Civil War*, p. 14.

party] can do without some degree of cooperation from a very robust 49-vote minority," remarked a Senate minority leader.[33] Or as a former Senate majority leader stated:

> I think the toughest job in the whole city [is] being the majority leader in the Senate, and not just because I had it but because I got to see what it was all about. The President has the whole administration, the Speaker has the Rules Committee, but the leaders of the Senate, on both sides of the aisle, they lead because of who they are and the power of persuasion they have and the respect for the position they hold. Nothing in the Constitution gives them special powers.[34]

Cooperation across party lines, in brief, is sometimes hard to come by for two basic reasons: the arsenal of parliamentary tools that any senator can employ to frustrate policymaking and a Senate which is increasingly partisan and whose members employ public relations (or "message") strategies—the war of words—to advance party-preferred objectives. The tone of partisan warfare that often surrounds debate on many important issues makes it difficult for either side to achieve compromises that can pass the Senate. Partisan polarization in the Senate, wrote a congressional scholar, "has made constructing the necessary deals considerably tougher; the two parties' notions of what constitutes good public policy have little overlap."[35]

Exclusion of Minority Conferees From Bicameral Negotiations

A specific catalyst made Senate formation of conference committees during the early 2000s highly problematic: the exclusion of minority party members from conference committee participation. As a Senate committee chair told a group of his chamber's minority party conferees, "We don't expect you to sign [the conference report], so we don't expect you to be needed" in the bargaining sessions.[36] Four other examples underscore the exclusionary point.

- In 2000, a minority party senator lamented: "I have been appointed to conference committees in the Senate in name only, where my name will be read by the [presiding officer] and only the conference of Republicans goes off and meets, adopts a conference report, signs it, and sends it back to the floor without even inviting me to attend a session."[37]
- A year later another Senator stated: "After much talk of bipartisanship, the other side locked out the Democrats from the conference committee....We were invited to the first meeting and told we would not be invited back, that the Republican majority was going to write the budget all on their own, which they have done."[38]
- In 2003, a minority party senator said: "Once this [class action] bill leaves the Senate floor, Democrats have no bargaining power. We're not invited to any conferences."[39]

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[33] Carl Hulse, "Senate G.O.P. Leader Adapts to an Unexpected Role," *New York Times*, November 30, 2006, p. A20.

[34] *Congressional Record*, vol. 153, December 18, 2007, p. S15817.

[35] Barbara Sinclair, *Party Wars: Polarization and the Politics of National Policy Making* (Norman, OK: University of Oklahoma Press, 2006), p. 227.

[36] Daniel J. Parks, "Bush Starts to Deal on Budget, Only Hardening Resolve of Some," *CQ Weekly*, April 28, 2001, p. 904.

[37] *Congressional Record*, vol. 146, May 16, 2000, p. S3991.

[38] *Congressional Record*, vol. 147, May 4, 2001, p. S4377.

[39] Mark Wegner and April Fulton, "Crashing the Party," *National Journal*, November 8, 2003, p. 3421.

- Two years later, another minority party lawmaker declaimed: "On issue after issue, we have had conferences where the minority was excluded so that the majority could ram through unpopular provisions as part of an un-amendable conference report."[40]

Members of the House minority have also been excluded from participating in conference negotiations. In one case, the ranking member of the Committee on Ways and Means, along with several party colleagues, crashed a conference meeting held in the chairman's Capitol hideaway. Only majority party members were present except for two minority party senators sympathetic to the majority's policy goals.[41] Another ranking House minority committee member exclaimed that conferences "are simply conferences between a few well-connected people on the majority side of the aisle, with no real consultation with the minority."[42]

The House minority, unlike its counterpart in the Senate, has no effective way to block the formation of conference committees given the "majority rule" bias of its procedures. To be sure, the House minority can express its anger or frustration at being excluded from conference negotiations through various dilatory actions, such as forcing votes on repetitious motions to adjourn the House, or, as House Rule XXII, clause 7 states, offering numerous motions to instruct conferees "after a conference committee has been appointed for 20 calendar days or 10 legislative days."

Senators, as noted earlier, have formidable parliamentary means to protest their exclusion from conference negotiations. "We don't think a conference can truly be a conference if only one party is represented," stated a Senate minority leader. He added that until minority conferees are assured of being present at all conference meetings, "we are unable to provide consent to go to conference."[43] Decisions to prevent the convening of conference committees by the minority leader were made on a case-by-case basis.

In lieu of convening a conference committee, the minority leader recommended that the Senate follow two other approaches to reach bicameral agreement on legislation. First, persuade the other chamber to pass Senate bills without making changes to them. Second, conduct pre-conference bargaining sessions with the other chamber and then either "confirm our agreements in a formal conference once the negotiations have been completed"[44] or approve them using the ping pong approach.

In sum, the convening of conference committees by unanimous consent is no longer the routine matter it once was. "Historically in the Senate," remarked a senator, "when we passed a bill, we automatically went to conference. That has changed." Now, advocates of getting to conference have to secure unanimous consent, "or we do not get to conference."[45] That was also the case before—obtaining unanimous consent—but winning approval of those requests today is often much harder to attain.

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[40] *Congressional Record*, vol. 151, July 25, 2005, p. S8832.

[41] Kate Schuler, "Democrats Crash Conference Meeting," *CQ Weekly*, November 1, 2003, p. 2703.

[42] *Congressional Record*, vol. 149, November 5, 2003, p. H10395.

[43] *Congressional Record*, vol. 150, February, 2004, p. S550. Upset at the exclusionary practice, a minority party Senator noted that if the majority party's conferees ignored the minority's viewpoints, floor consideration of the conference report could trigger the "procedural nuclear weapon"—the filibuster. See "GOP Leaders Take a Short Time-Out in Final Push on Omnibus Energy Bill," *CQ Today*, October 2, 2003, p. 5.

[44] *Congressional Record*, vol. 150, February 4, 2004, p. S551.

[45] Hulse and Pear, "Feeling Left Out on Major Bills, Democrats Turn to Stalling Others," p. A18.

If the regular order is going to conference on major legislation, with majority and minority conferees as full participants, that pattern has generally not been the case in recent Congresses. Instead, there has been a noticeable shift away from convening formal conferences—largely because of disagreements in the Senate—toward House-Senate majority leadership-dominated "informal conferences." Once this House-Senate group settles their differences through informal negotiations, the ping pong approach has been employed to win bicameral approval of the leaders' work product. As a congressional correspondent wrote:

Once the penultimate stage in the life of any bill as a forum for House and Senate members to work out their differences, the conference committee has fallen on hard times, shoved aside in the last five years by partisanship and legislative expediency.

> The preferred alternative revolves around informal meetings mainly among senior Democratic [or Republican] lawmakers, who gather to cut a final deal and then bat the finished product back and forth between the House and Senate until it is approved.[46]

A look at why the back-and-forth process was utilized on three measures may provide a better understanding of ping pong's role in the contemporary bicameral lawmaking process.

Three Case Examples

Energy Independence and Security Act (H.R. 6)

On December 17, 2007, President Bush signed H.R. 6 into law (P.L. 110-140). However, the bill's path to enactment was filled with twists and turns and procedural obstacles that made agreement difficult among the House, Senate, and Executive. The House moved first to enact H.R. 6 on January 18, 2007, because the bill limited tax subsidies for oil and gas companies. (The Constitution requires the House to initiate revenue measures.) The legislation also encouraged the development of alternative energy sources, such as solar or windmill.

There is another reason for the rather rapid House action: H.R. 6 was part of Speaker Nancy Pelosi's "first 100 legislative hours" agenda, which Democrats campaigned on in the November 2006 elections. H.R. 6 was referred to four committees but none of them formally considered the legislation by holding hearings, markups, and issuing committee reports. The measure was brought up in the House on January 18, 2007, under a closed rule; it was agreed to by a 264 to 163 vote.

H.R. 6 was then sent to the Senate where it was placed on the legislative calendar rather than being referred because of its tax provisions to the Finance Committee. Senate Democrats planned "to assemble their own energy package" with the Energy and Natural Resources Committee, along with other panels, contributing to this endeavor.[47] In fact, the majority leader assembled a bipartisan energy package from the recommendations put forward by the Energy, Environment, and Commerce Committees and offered it as a complete substitute—the functional equivalent of a separate policy proposal—for H.R. 6. As the majority leader noted, the bill we begin debate on today (June 11) is "a substitute to H.R. 6."[48]

On June 21, after procedural delays and intense lobbying by various stakeholders (automobile companies, environmental groups, and so on), the Senate by a 65 to 27 vote passed a

[46] Carl Hulse, "In Conference: Process Undone By Partisanship," *New York Times*, September 26, 2007, p. A1.

[47] Jeff Tollefson, "House Passes Bill to Cut Oil Subsidies," *CQ Weekly*, January 22, 2007, p. 253.

[48] *Congressional Record*, vol. 153, June 11, 2007, p. S7418.

comprehensive energy measure as an amendment (the aforementioned leadership substitute) to H.R. 6. A noteworthy Senate provision was an increase—from 25 to 35 miles per gallon by 2020—in the corporate average fuel economy (CAFÉ) standards for cars and light trucks. However, the Senate rejected raising taxes on oil and gas. H.R. 6, as amended, was returned to the House.

On August 4, the House passed its version of comprehensive energy legislation (H.R. 3221). Unlike H.R. 6, which repealed about $14 billion in tax breaks for the oil and gas industry, H.R. 3221 addressed a wide range of energy issues: global warming, renewable energy, innovative energy technologies, and much more. It was the product of nearly a dozen committees. Like most major bills, H.R. 3221 was considered under a special rule from the Rules Committee, which made in order back-to-back consideration of two measures. The House first considered and agreed to the comprehensive energy bill (H.R. 3221). Then the House debated and passed a separate bill (H.R. 2776) that raised taxes on oil and gas with the revenue going to pay for the energy programs identified in H.R. 3221. Finally, as the special rule directed, the text of H.R. 2776 as passed by the House was added "as new matter at the end of H.R. 3221."[49] The entire energy package (H.R. 3221) was sent to the Senate on September 4 and placed on the legislative calendar. Cloture was twice required—once on the motion to proceed and once on the bill itself. To date, it has not passed the Senate.

Instead, senior committee and leadership staff aides from the two chambers began informal discussions in the Fall about how to reconcile their differences on the various energy provisions contained in the House-passed version of H.R. 6; the Senate leader's substitute for H.R. 6; and H.R. 3221.[50] Arguably complicating the discussions was a procedural issue. What bill were the two sides conferring on: H.R. 6 or H.R. 3221? The usual practice in going to conference is for each chamber to pass different versions of a measure but with the same bill number. A majority leadership spokesperson noted, however, that participants can "work around" those procedural concerns, and they did.[51] Informal staff negotiations continued, but relatively little progress was made in settling differences and in "producing one bill that has a chance of passing both chambers."[52]

As a party, Senate Republicans were divided on whether there would be a formal or informal energy conference. On one side were minority members who wanted to convene a formal conference and even wrote to the majority leader "criticizing the informal talks and asking for a conference."[53] On the other side were minority members who had placed "holds" on going to conference, in part because they objected to House action repealing tax breaks for the oil and gas industry.[54] They also objected to the majority leader's unanimous consent request to go to conference.[55] The minority leader favored going to conference but recognized that the chances

[49] Ibid., August 4, 2007, p. H9715.

[50] Coral Davenport, "Procedural Difficulties Deal a Setback to Energy Legislation, Talks Continue," *CQ Today*, September 21, 2007, p. 10.

[51] Darren Goode, "Reid Wants To Proceed To Conference By End Of The Week," National Journal's *CongressDailyAM*, October 3, 2007, p. 9.

[52] Coral Davenport, "Getting to Conference Seems to Be Energy Legislation's Biggest Hurdle," *CQ Today*, October 24, 2007, p. 19.

[53] Ibid.

[54] A hold, a Senator explained, is "a notice by a Senator to his or her party leader of an intention to object to bringing a bill or nomination to the floor for consideration." *Congressional Record*, vol. 148, April 17, 2002, p. S2850. See CRS Report RL34255, *Senate Policy on "Holds": Action in the 110th Congress*, coordinated by Walter J. Oleszek.

[55] *Congressional Record*, vol. 153, October 19, 2007, pp. S13146-S13147.

were "pretty slim."[56] The majority leader underscored that the House and Senate would move forward on the energy legislation "one way or the other" and "regardless of whether there is a conference."[57]

In the end, unable to convene a conference committee, the bicameral majority leadership bypassed it. The Speaker consulted extensively with the relevant House and Senate committee chairs, as well as the majority party caucus, to forge common ground on H.R. 6, as amended by the Senate. The "dealmaking pattern," according to one account, involved "Senate committee chairmen working with their House counterparts while talking to the Speaker."[58] Hard bargaining continued for weeks and when Congress reconvened following its traditional Thanksgiving recess, it was anticipated that key negotiators from each chamber would reach a bicameral accord by early December. And this turned out to be the case, in part because of the favorable external context—high gasoline prices with a barrel of oil nearing $100, as well as heightened national and world concern about global warming. These outside circumstances encouraged lawmakers to back the informally crafted bicameral compromise despite complaints from both sides of the aisle.

On December 6, the House took up and concurred in the leadership-designed House amendment to the Senate amendment to H.R. 6. The House amendment—hammered out in private negotiations by the House and Senate majority leadership—contained provisions in the originally passed H.R. 6, the Senate leadership's substitute, and H.R. 3221. Further, the House majority leadership ensured that the House amendment would be considered under a restricted procedure. The amendment was taken up under the terms of a special rule (H.Res. 846): one hour of debate, no amendments, no motion to recommit, and a vote on final passage. The House voted 235 to 181 to adopt the revamped H.R. 6, which now included two controversial provisions known to be opposed by various senators (the repeal of oil and gas tax breaks and a requirement that utilities produce 15 percent of their electricity from alternative sources by 2020). The legislation was transmitted to the Senate. Meanwhile, President Bush was threatening to veto the energy bill, in large measure because of those two provisions.

The next day, December 7, the Senate began debate on the motion to concur in the House amendment—the bicameral accord negotiated without a conference—to the Senate amendment to H.R. 6. As soon as the majority leader called up the bicameral accord, he immediately filed cloture on the motion to concur. Subsequently, the Senate tried unsuccessfully (53 to 42) to invoke cloture on the motion to concur.[59] The cloture motion failed to attract the required 60 votes (three-fifths of the Senate membership) largely because of senatorial opposition to the elimination of tax incentives for the oil and gas industry and the renewable electricity provision. As the minority leader stated, "the bill we are voting on today is a massive tax hike and a utility rate increase for consumers across the Southeast."[60] Still, senators from both parties continued to negotiate so that an energy package might clear their chamber.

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[56] Darren Goode, "Dems Moving Forward on Tax Provisions," *National Journal's Congress DailyAM*, October l2, 2007, p. 14.

[57] Ibid.

[58] Alan K. Ota, "Senate Chairmen Play Larger Role With Pelosi," *CQ Today*, December 4, 2007, p. 1. The Senate majority leader relied on his committee chairs to discuss compromises with the Speaker. "I really believe in the committee process," he said. "That's why I have empowered committee chairs to do their committee work." Ibid., p. 28.

[59] *Congressional Record*, vol. 153, December 7, 2007, p. S15009.

[60] Ibid., p. S15007.

On December 12, the majority leader tried another approach to win Senate passage of an energy package. He "filled the tree" on the motion to concur to the House amendment with a revamped Senate energy package. He also filed cloture on the motion to concur to the revised Senate amendment. To mobilize the required 60 votes to invoke cloture, the Senate amendment was carefully crafted to garner sufficient support. For example, the renewable electricity mandate was dropped and energy taxes were modified; both changes were made with an eye toward wooing wavering senators.[61] "Both sides were using whatever inducements they could to get us to vote" their way, said a senator.[62] The next day the Senate failed to invoke cloture (59 to 40) to end debate on the majority leader's revamped energy package.

Later that same day, the majority leader received unanimous consent to withdraw his pending motion to concur and to offer a motion to concur in the House's amendment with another revised Senate energy amendment. It basically contained the energy provisions negotiated originally by the key bicameral leaders, minus the controversial tax and electricity provisions. The Senate then agreed to H.R. 6, as amended, by an 86 to 8 vote.[63]

On December 18, the House adopted a special rule that authorized the majority leader (or his designee) to offer a motion that the House concur in the Senate amendment.[64] The chair of the Energy and Commerce Committee made that motion to concur on behalf of the majority leader, which the House agreed to by a vote of 314 to 100.[65] With passage of H.R. 6, as amended, by both chambers, the measure was cleared for presidential consideration. The next day, December 19, 2007, H.R. 6, as amended, was signed into law (P.L. 110-140).

A summary of the ping ponging of the energy bill sets out in bold relief the operation of the exchange of amendment procedure.

- **H.R. 6.** This bill reduced tax subsidies for oil and gas and redirected those revenue savings to the production of alternative fuels. It was passed by the House and sent to the Senate.
- **S. Amendment to H.R. 6.** The Senate replaced the text of H.R. 6 with a complete substitute that represented its approach to comprehensive energy reform. A key feature of the Senate plan was higher fuel standards for cars and light trucks. However, the Senate rejected tax increases on oil and gas production. The Senate returned H.R. 6, as amended, to the House.
- **H.R. 3221.** The House adopted a separate bill, which was its comprehensive approach to energy. The measure was sent to the Senate, but it was not acted upon because of senatorial opposition to various provisions, such as the repeal of tax provisions supported by the oil and gas industry.
- **H. Amendment to S. Amendment to H.R. 6.** Unable to convene a conference, informal negotiations between key House and Senate party and committee leaders produced an alternative to the Senate's energy plan (the aforementioned complete substitute). The House passed this amendment, but it contained

[61] *Congressional Record*, vol. 153, December 13, 2007, pp. S15388-S15389.

[62] Richard Rubin and Kathleen Hunter, "Burning for Victory, Democrats Come Up Short," *CQ Today*, December 14, 2007, p. 1.

[63] *Congressional Record*, vol. 153, December 13, 2007, p. S15432.

[64] *Congressional Record*, vol. 153, December 18, 2007, pp. H16651-H16658. The special rule (H.Res. 877) provided for House consideration of the Senate amendment to the House amendment to the Senate amendment to H.R. 6.

[65] Ibid., pp. H16738, H16752.

controversial provisions that aroused senatorial opposition, such as the repeal of tax subsidies for oil and gas producers.

- **S. Amendment to H. Amendment to S. Amendment to H.R. 6.** Unable to overcome resistance by senators opposed to ending tax subsidies for the oil and gas industry and other controversial provisions contained in the House amendment, the Senate deleted those provisions and passed another version of energy legislation as a Senate amendment to the House amendment. H.R. 6, as further amended by the Senate, was returned to the House.
- **Enactment Into Law.** The House adopted the Senate amendment without change, clearing the amended version of H.R. 6 for presidential consideration. The measure was signed into law by the chief executive.

To sum up, the principal factors that precipitated use of the ping pong approach were large concerns among certain Senators about raising taxes on the oil and gas industry and requiring utility companies to use alternative energy sources to produce electricity. These lawmakers exercised their parliamentary prerogatives to block the convening of a conference committee on H.R. 6. As a result, House and Senate party leaders decided to use the amendment exchange procedure with the Speaker taking a lead role in negotiating the final compromise with appropriate House and Senate committee leaders. Further, with the first session nearing an end, and with the American public dismayed about the high price of gasoline at the pump, both parties acted to pass the energy bill.

Ethics and Lobbying Reform (S. 1)

The 110th Congress enacted a major ethics and lobbying reform measure (S. 1), which was signed into law (P.L. 110-81). The legislation was titled the Honest Leadership and Open Government Act. The Senate passed its version of S. 1 on January 18, 2007, by a 96 to 2 vote. Six days later S. 1 was received in the House and held at the desk. The House enacted a companion honest leadership bill (H.R. 2316) on May 24, 2007, by a 396 to 22 vote. That same day the House also agreed to the Lobbying Transparency Act (H.R. 2317). Subsequent to House passage of the legislation, a spokesperson for the Senate majority leader stated that the leader "intends to move as quickly as possible to not only appoint conferees, but to get the final bill done as well."[66] On June 28, the majority leader failed to receive unanimous consent so the Senate might convene a conference with the House. The Senate's minority leader also backed the convening of a conference committee on S. 1.[67]

A number of Senators, however, opposed the appointment of conferees. They were fearful that an earmark transparency provision adopted as part of S. 1, and which was agreed to by a 98 to 0 vote, would either be weakened in conference or not included at all in the conference report. These senators wanted a guarantee from the majority leader that the Senate's earmark language would not be changed by the conference committee. That guarantee was not forthcoming from the majority leader. It would "not say much about my leadership if we negotiated [earmark

[66] Mark Wegner and Christian Bourge, "Senate Dems Preparing For Conference On Lobbying Bill," *National Journal's CongressDailyPM*, June 1, 2007, p. 8.

[67] Mark Wegner, "McConnell: Still Time To Pass Lobby Bill Before Recess," *National Journal's CongressDailyPM*, July 20, 2007, p. 1. In remarks to reporters, the minority leader stated that it was important to pass S. 1 before the August recess even without a formal conference committee. "Either way, I think we ought to wrap the bill up. I'd rather have the Republicans at the table than not. But I do think it's time to act." See Kenneth Doyle, "McConnell OKs Plan to Pass Lobby Bill Without Convening Conference Committee," *Daily Report for Executives*, July 23, 2007, p. A-1.

reform] out here on the floor of the Senate as to what was going to be in the conference committee. That is what the conferees are all about," said the majority leader.[68]

The sponsor of the earmark reform provision also proposed that the Senate simply adopt the earmark changes as part of the Senate's rules. "Why can't we just accept that part here and go to conference with all of these other provisions in which you know our Members are interested?" He even asked the unanimous consent of the Senate to adopt two resolutions to accomplish that goal, but a senator objected to his request.[69] The majority leader, who opposed the idea, gave no public reason so far as is known as to why he did not favor adopting the senator's earmark reforms as part of the internal rules of the Senate.[70] However, other Senators indicated why the earmark reforms were not adopted as part of chamber rules. Changes were required, said a lawmaker, to "make the language workable."[71]

In the end, the Speaker and Senate majority leader decided to bypass the conference stage and negotiate informally with key lawmakers to produce a bicameral compromise that both chambers might pass by the August 2007 recess. They achieved their goal. Intensive private negotiations led to a rewrite of ethics and lobbying reform. When the Democratic leaders unveiled their ethics and lobbying package on July 30, it received generally positive responses from outside groups as well as many rank-and-file lawmakers in both chambers. The next day, and as a sign of wide support among House members for the leadership's package, the House amendment to S. 1 was taken up under a procedure (suspension of the rules) requiring a two-thirds vote for passage, permitting no amendments from the floor, and allowing for only 40 minutes of debate. Further, motions to recommit are not permitted when the House suspends its rules to pass legislation. The House overwhelmingly (411 to 8) agreed to the House amendment to S. 1.

S. 1, as amended by the House, was returned to the Senate for its review of the compromise package. Critics of the leadership's negotiated compromise strongly objected to the revised ethics and lobbying measure, especially because they believed it weakened the earmark changes which the Senate had adopted unanimously on January 18, 2007. Senate opponents of the leadership-crafted agreement recognized they confronted an uphill battle—eventually unsuccessful—to block or change the House amendment. Several procedural and political factors account for this result.

First, when the majority leader asked the presiding officer to lay S. 1 with the House amendment before the Senate, he immediately filed a cloture motion to close debate on the House amendment. Further, he then "filled the amendment tree" on the motion to concur in the House amendment to S. 1. His action prevented opponents of the package from attempting to alter the House amendment to their liking before the Senate voted on whether to agree to the cloture

[68] *Congressional Record*, vol. 153, June 28, 2007, pp. S8667-S8668. See Martin Kady, "Senate Republicans Block Conference on Lobbying Overhaul Legislation," *CQ Today*, June 27, 2007, p. 3.

[69] Ibid., p. S8668.

[70] It was reported that Senate "aides and lawmakers for weeks have speculated that [the majority leader] either hopes to change [the earmark provisions contained in S. 1] during conference or to use them as a bargaining chip with Senate negotiators during the talks." John Stanton and Susan Davis, "Ethics Bill Will Return to Floor," *Roll Call*, July 19, 2007, p. 30. Worth noting is that the majority leader did reportedly offer to put the author of the earmark reform provision on the conference committee. That offer was reportedly rejected. "The majority leader is trying to be clever," said the earmark sponsor. "Everybody knows Democrats are going to control the conference, 4 to 3, and they will vote 4 to 3 to kill earmark reform. Being on the conference committee won't do a thing to protect earmark reform." Chris Strohm and Ben Schneider, "New Roadblocks Delay Conferences," *National Journal's CongressDailyAM*, July 17, 2007, pp. 1, 14.

[71] *Congressional Record*, vol. 153, August 2, 2007, p. S10714.

motion. Adoption of cloture would cut off the possibility of lengthy debate (i.e., a filibuster) on the motion to concur.

Worth noting is that most measures or matters typically require 60 votes (or three-fifths of the total membership) to invoke cloture. In this case, a two-thirds vote was required to close debate because Senate Rule XXII (cloture) stipulates that on a measure or motion to amend Senate rules, an "affirmative vote [to invoke cloture] shall be two-thirds of the Senators present and voting." Plainly, S. 1, as amended by the House, contained changes to Senate rules, such as new requirements regarding the transparency of earmarks. In the end, the Senate invoked cloture on the majority leader's motion to concur in the House amendment by an 80 to 17 vote.[72]

Second, the minority party was divided on the ethics and lobbying package. Many supported its passage, including the minority leader, despite misgivings about some of the provisions. As one minority senator was reported to say, it would be "hard to vote against a lot of good things [in the ethics and lobbying package] because there are some bad things there. We vote on imperfect legislation every day."[73]

Third, the political circumstances made it difficult for many lawmakers to vote against an ethics and lobbying reform package, especially with the August work period looming and the potential for constituents asking Members how they voted on what seemed like a "good government" initiative. (Recall that the "culture of corruption" was a theme used during the November 2006 elections.) In the judgment of one Senate minority staff aide, "There have been [corruption] investigations and questions involving some members, and the natural instinct is to do something—or anything, even if anything is bad—simply to look productive." He further opined: "We're looking at the path of least resistance versus good legislation, and typically in these situations, the former rather than the latter wins out."[74]

To conclude, both parties recognized that public dismay with the Congress over lobbying scandals, combined with the promises made by House and Senate majority party leaders to enact ethics and lobbying reforms, prompted enactment of S. 1. The inability to create a conference committee can be largely attributed to a relatively small number of Senators who were concerned that the earmark reforms they successfully championed would be dropped or diluted by the conferees. Thus, the exchange of amendment procedure was employed with each chamber's party leader in charge of the informal negotiating process. Most party members in each chamber supported the final compromise, and S. 1 (the bill number symbolized its priority status) passed with large majorities in each house.

Reauthorization of SCHIP (H.R. 976)

The State Children's Health Insurance Program (SCHIP) was created more than a decade ago as part of the Balanced Budget Act of 1997 (P.L. 105-33). SCHIP provides "federal matching funds

[72] *Congressional Record*, vol. 153, August 2, 2007, p. S10716. On this particular vote, only 66 votes were required to invoke cloture—assuming every senator votes—because a senator was ill and unable to participate in Senate proceedings.

[73] Tory Newmyer, "Senate Moves on Ethics Bill," *Roll Call*, August 2, 2007, p. 24.

[74] Chris Frates and Josephine Hearn, "[A Senator] Pledges Ethics Fight," *Politico*, August 1, 2007, p. 12. Because the congressional Democratic leadership was worried that President Bush might "pocket veto" S. 1 during Congress's August recess, they delayed sending the legislation to the White House until Congress returned and had an opportunity to override any veto by a two-thirds vote of each chamber. See John Stanton, "Leaders Holding Ethics Bill," *Roll Call*, August 13, 2007, p. 3.

to states and territories to provide health insurance to certain low-income children"[75] whose families are not poor enough to qualify for Medicaid. In 2007, both the House and Senate took steps to reauthorize and expand the program.

The House agreed to its version of the reauthorization bill (H.R. 3162) on August 1, by a vote of 225 to 204.[76] The closeness of the vote underscores the concern that many lawmakers had with the legislation.[77] Called CHAMP (Children's Health and Medicare Protection Act), the House bill expanded coverage by adding 5 million uninsured children to the 6 million children currently covered by the program; increasing spending for SCHIP by an estimated $50 billion over five years; and making various changes to Medicare, such as reducing seniors' co-payments for preventive care. To offset the spending increases, the legislation proposed cutting a program in which private insurers provide benefits to the elderly (Medicare Advantage) and hiking by 45 cents the cigarette tax per pack. The legislation was forwarded to the Senate, but that chamber took no action on the bill.

On the day before the House passed CHAMP, July 31, the Senate began consideration of its approach to reauthorizing SCHIP. The Senate used a House-passed bill (H.R. 976)—The Small Business Tax Relief Act—as the vehicle for reauthorizing SCHIP. Why? Because the SCHIP bill reported by the Senate Finance Committee contained tax provisions, and the Constitution, as noted earlier, requires revenue-raising measures to be initiated by the House. Thus, when H.R. 976 was taken up, the Finance chair offered a complete substitute. The substitute replaced all the text in H.R. 976 with the measure (S. 1893) reported by the Finance Committee.

The Senate's version of the SCHIP reauthorization was narrower than the House's. For example, the Senate proposed a $35 billion expansion compared with the House's nearly $50 billion addition to SCHIP, and the Senate's substitute did not include changes to Medicare, as did the House's bill. On August 2, the Senate passed its version of SCHIP by a 68 to 31 vote, setting the stage for the convening of a conference committee.[78] Meanwhile, President Bush said he opposed both chambers' bills and would not sign either into law.[79] He advocated a $5 billion expansion of SCHIP.

When lawmakers returned to Capitol Hill following the August recess, a top priority was to reconcile bicameral differences on SCHIP. (The program was set to expire at the end of September.) On September 4, the Senate majority leader asked unanimous consent to appoint conferees on the SCHIP bill (H.R. 976), but his request was objected to by the minority leader who said the request was "a little premature."[80] It was reported that minority party members "want assurances ahead of a conference that the final bill will closely resemble the Senate-passed

[75] CRS Report RL30473, *State Children's Health Insurance Program (SCHIP): A Brief Overview*, by Elicia J. Herz, Chris L. Peterson, and Evelyne P. Baumrucker.

[76] *Congressional Record*, vol. 153, August 1, 2007, pp. H9502-H9503.

[77] As a lawmaker stated: "This nearly 500-page bill is being rammed through the House with the Rules Committee meeting at 1 a.m. this morning and with no Members even allowed to propose fixes or alternatives because we are told it is absolutely imperative that Congress act to provide government-run health care coverage to more Americans." See *Congressional Record*, vol. 153, August 1, 2007, p. H9293. Another Member exclaimed that H.R. 3162 is really about "cutting Medicare. They are doing it under the guise of covering children." Ibid., p. H9297.

[78] *Congressional Record*, vol. 153, August 2, 2007, p. S10761.

[79] Alex Wayne, "Tough Negotiations Ahead on Children's Health Care Expansion, Medicare," *CQ Today*, August 3, 2007, p. 5.

[80] *Congressional Record*, vol. 153, September 4, 2007, p. S11002.

legislation in scope and spending rather than the more ambitious and expensive House bill."[81] Such assurances were not provided by the bicameral majority leadership.

Accordingly, top majority party and committee leaders of each house met informally to determine a course of action given the impasse in the Senate. In the end, unable to convene a conference committee, negotiations among House and Senate majority leaders and key GOP Senators produced a compromise that largely resembled the Senate-passed measure. House Democratic leaders realized that their expansive SCHIP bill could not pass the Senate, so they crafted a compromise (a House amendment to the Senate amendment to H.R. 976) that might pass that chamber. Senior House committee leaders were upset with the compromise, because they reportedly believed their side conceded too much to Senate negotiators. At the same time, they pointed to the political necessity of passing the SCHIP reauthorization. "[W]e have no choice but to send something to the president's desk or be accused of not doing something on children's health insurance" remarked a House committee chair.[82]

On September 25, the House agreed to the negotiated compromise—technically the House amendment to the Senate amendment—by a 265 to 159 vote, short of the two-thirds required to override the president's expected veto. The next day the Senate majority leader called up the message from the House with respect to H.R. 976.[83] Immediately, the majority leader filed cloture on the motion to concur with the House amendment. He then "filled the tree" on the motion to concur to prevent opponents from offering amendments to the leader's motion that could undermine or delay passage of the SCHIP reauthorization before the September 30 expiration deadline.[84] On September 27, the Senate voted (69 to 30) to invoke cloture; it then passed the motion to concur to the House's amendment by a 67 to 29 vote, clearing the measure for presidential consideration.[85]

As promised, President Bush vetoed the SCHIP reauthorization on October 3, in large measure because it was too costly: he wanted to spend $5 billion more on the program, not Congress's $35 billion.[86] The House, acting first, failed on October 18 to override the president's veto, but lawmakers in both chambers continued their efforts to expand the children's health insurance program.[87]

In summary, consideration of SCHIP aroused strong views in the two parties and the two chambers. The measure passed the House in a close vote. It easily was agreed to in the Senate, in part because the final version of the legislation was narrower and less costly than the House's

[81] Alex Wayne, "Children's Health Bill Dealt a Setback as Sept. 30 Deadline Looms," *CQ Today*, September 5, 2007, p. 12.

[82] Alex Wayne, "Congress Expected to Vote Next Week on SCHIP Bill Close to Senate Version," *CQ Today*, September 19, 2007, p. 6.

[83] The message from the House stated: "Resolved, That the House agree to the amendments of the Senate to the bill (H.R. 976) 'an Act to amend the Internal Revenue Code of 1968 to provide tax relief for small businesses, and for other purposes,' with amendments." *Congressional Record*, vol. 153, September 25, 2007, p. S12122.

[84] *Congressional Record*, vol. 153, September 26, 2007, pp. S12122-S12123.

[85] *Congressional Record*, vol. 153, September 27, 2007, pp. S12206-S12207, S12255.

[86] Sheryl Gay Stolberg and Carl Hulse, "Bush Vetoes Health Bill Privately, Without Fanfare," *New York Times*, October 4, 2007, p. A17.

[87] Congress sent another SCHIP reauthorization bill (H.R. 3963) to the White House, which the president also vetoed. See CRS Report RS22746, *SCHIP: Differences Between H.R. 3963 and H.R. 976*, by Evelyne P. Baumrucker et al. Four continuing resolutions provided funding for SCHIP through December 31, 2007, with the Medicare, Medicaid, and SCHIP Extension Act (P.L. 110-173, enacted December 29, 2007) providing funds through March 31, 2009. See CRS Report RL30473, *State Children's Health Insurance Program (SCHIP): A Brief Overview*, by Elicia J. Herz, Chris L. Peterson, and Evelyne P. Baumrucker. Also see Alex Wayne, "After Medicare Vote, SCHIP Gets Another Look," *CQ Today*, July 11, 2008, p. 1.

original bill. A number of Senators blocked the appointment of conferees, because they wanted commitments that any compromise that emerged from conference would comport with their views. Unable to create a conference committee, majority party leaders turned to the ping pong method, which included informal negotiations among a limited number of House and Senate majority party lawmakers along with a few minority party Senators. Their privately negotiated compromise—a House amendment to the Senate amendment to H.R. 976—was subsequently agreed to by both chambers, but President Bush vetoed the SCHIP reauthorization.

Bypassing the Conference Stage: Reasons and Implications

The recent tendency to bypass the conference stage underscores that House-Senate interrelationships change and adapt to the broader legislative-political environment of which they are a part. Compared with the 1950s or 1960s, today's Congress is more open, partisan, workload-packed, and deadline-driven; there are many more interest groups that influence and monitor legislative proceedings; and individual lawmakers are not reluctant to utilize parliamentary tools to advance their objectives. Because these developments have sometimes made the convening of conference committees problematic, the exchange of amendment procedure—and the concomitant informal negotiations that accompany it—has become a more efficient method for resolving bicameral differences on major legislation.

Several of the reasons for the heightened importance of the ping pong approach, and the implications that flow from its use on major legislation, seem directly or indirectly related to at least six factors (setting aside the earlier discussion about the relative ease of blocking the appointment of conferees in the Senate). The six are (1) a further enhancement of the role of party leaders; (2) limits on the role of committees and their leaders; (3) a marginal role of the minority party; (4) constraints on the deliberative process; (5) the avoidance of procedural/political issues; and (6) the lack of transparency.

Whether these factors are causes or effects of ping ponging, or both, merits brief mention. Because cause and effect are hard to disentangle, it is probably safe to say that the six factors reflect both ingredients to one degree or another. For example, the apparent increase in reliance on ping ponging might be viewed as either a cause or effect of enhanced party leadership influence. A *cause* because party leaders today play a larger role throughout all lawmaking stages, including bicameral negotiations. The preference of party leaders, in short, might be to utilize amendment exchange rather than conference committees so as to better ensure the achievement of party-preferred goals. An *effect* because difficulties in creating conference committees have provided central party leaders with more opportunities to step in and assume wider responsibility for reconciling bicameral differences on major legislation through the ping pong (and informal negotiating) method. Perhaps more useful than making judgments about cause and effect is to consider whether difficulties in forming conference committees helped to encourage these six developments.

Further Enhancement of the Role of Party Leaders

By any reasonable test, the four Capitol Hill party organizations play active roles in the lawmaking process. Their organizational elements (party caucuses or committees, for example) are active, party leaders are increasingly prominent, and party voting is at comparatively high levels. Given sharp conflicts between the two parties on key policy issues and narrow margins of party control, rank-and-file lawmakers generally recognize the need for strong leadership for their

substantive and political agenda to succeed. The partisan polarization in Congress contributes to strengthened party leadership, especially in the House. Nevertheless, "majority party senators expect their leader to exploit majority status for partisan advantage."[88]

If conference committees cannot be convened because of dilatory practices—or if time constraints prevent their use—the principal negotiators on major legislation are often House and Senate majority leaders, along with a limited number of other key lawmakers. On SCHIP, for example, House majority leaders indicated that if the Senate was unable to convene a conference because of blocking actions by various senators, they would meet informally with their Senate leadership counterparts to negotiate a compromise. As one account noted, the top House and Senate majority leaders "met for nearly two hours" working "to reach a final agreement on compromise [SCHIP] legislation."[89]

Regardless of the reasons that prevent the convening of conference committees, the exchange of amendments procedure highlights the powerful negotiating role of central party leaders. They are strategically positioned to fashion major bicameral leadership compromises, perhaps with little input from rank-and-file members, the committee(s) of original jurisdiction, or the minority party. In short, the ping pong approach on major legislation is illustrative of the centralization of party control that characterizes the contemporary House and, to a lesser extent, the Senate. In the Senate, majority party leaders recognize that the ping pong method avoids a potential series of probably impossible-to-break filibusters associated with the appointment of conferees.

Limits on the Role of Committees and Their Leaders

The drift toward centralized party authority has tightened leadership influence over committees and their chairs. Six-year term limits for House committee and subcommittee chairs,[90] as well as comparable six-year term limits for Senate Republicans, restrict the ability of committee chairs to accrue independent authority, as occurred during earlier decades when pundits sometimes referred to the leaders of committees as the "dukes" or "barons" of Capitol Hill. Use of the ping pong procedure on the majority party's priorities can mean that committee leaders and members exercise generally minimal influence over the compromises reached by each chamber's top party leaders.

The aforementioned energy bill (H.R. 6) is an example of committee members with expertise on the issue criticizing the process by which the measure was jointly assembled by each chamber's majority leaders. Press reports indicated, for example, that as "many as 40 Democrats were reported to have signed a letter of complaint [to party leaders]" expressing their dismay at the secret development of the energy compromise.[91] As a committee chair stated:

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[88] Sinclair, *Party Wars,* p. 192.

[89] Steve Teske, "House, Senate Lawmakers Continue Work On SCHIP Compromise Reauthorization Bill," *Daily Report for Executives*, September 19, 2007, p. A-45.

[90] It is worth noting that Democratic Caucus Rules do not require term limits for House chairs. For example, it was reported recently that a majority party lawmaker pointed out that when the "issue of term limits has come up in the Democratic Caucus, it has been overwhelmingly defeated." He suggested that the House rule imposing term limits on chairs would be changed "when Democrats re-do their rules package next year." See Mike Soraghan, "Spotlight Back On Pelosi," *The Hill*, June 10, 2008, p. 11. Rule 14 of House Republican Conference rules for the 110th Congress states: "No individual shall serve more than three consecutive terms as Chairman or Ranking Member of a standing, select, joint, or ad hoc Committee or Subcommittee beginning with the 104th Congress."

[91] John J. Fialka and David Rogers, "House Passes Vast Energy Bill; Senate Overhaul Seen," *Wall Street Journal*, December 7, 2007, p. A10.

> H.R. 6is not the product of a formal conference, but rather the result of amendments being passed between the House and Senate as a means of resolving the differences between their respective bills. I have noted in the past, and will continue to note, that I find this manner of legislating to be unsatisfactory and unwise. Given the difficulty experienced by the Senate in going to conference on this bill this year, however, this process is the best that we can hope for under the circumstances .... One of the reasons this [ping pong] process is inferior to that of a formal conference is the lack of a conference report and, thus, the lack of a written legislative history detailing why certain policies were adopted and others excluded.[92]

In sum, unless committee leaders and members are invited to participate in the closed bicameral negotiations, they may have little or no say on the contents of the final leadership-produced compromise. "If we don't go to conference, there's no need for us to legislate on anything really," exclaimed a House chair, underscoring how the ping pong approach has shifted power from House and Senate committees to House and Senate party leaders.

Marginal Role of the Minority Party

Just as there have been cases of minority party exclusion from conference committees, as mentioned earlier, the same holds true in the case of the amendment exchange method. Minority party members have been excluded from these bicameral negotiating sessions, unless their input is sought by the leaders in charge of the back-and-forth amendment procedure. Moreover, such participation is more likely to involve minority Senators than minority House members. The contributions of minority party Senators might be important in devising a product that can attract not only a majority but also the supermajority vote often required to enact legislation in that chamber. For example, on the SCHIP legislation, two minority Senators "took part in the health talks but no [minority] House members did."[93]

The benefits of an inter-chamber bargaining process where all sides participate was underscored by a spokesperson for a House minority leader. Both parties' views are considered, the process is likely to be perceived as fair because it comports with the regular order, and a stronger and more credible bicameral product is likely to be the outcome. As the spokesperson explained:

> The conference process serves to allow Members to buy into a final bill. Sometimes there are tweaks and changes that have to be made, but it allows buy-in. Absent that kind of process, you're really getting a majority-driven bill without bipartisan support.[94]

Majority party lawmakers might reply that they understand the principle of minority rights, but contend that the other side often prefers obstructionism to cooperation so as to prevent the majority party from accomplishing its agenda. As a result, minority lawmakers may be excluded from participating in the processes for bicameral reconciliation. Ironically, because the Senate sometimes blocks the convening of conference committees, this may mean that Senators who normally would be chosen as conferees are likely to be excluded from the ping pong negotiations.

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[92] *Congressional Record*, vol. 153, December 28, 2008, p. E2665.

[93] Carl Hulse, "In Conference: l Process Undone By Partisanship," *New York Times*, September 26, 2007, p. A23.

[94] Emily Pierce and Jennifer Yachnin, "Tactical Skirmishes Intensified in 110th Congress," *Roll Call*, January 22, 2008, p. B-16. On a different but related matter that aroused the concern of minority lawmakers because they were not part of crafting a bill brought to the House floor, the ranking panel member stated: "When we were not a part of the process, when we don't have any input into the policy, there is over a 95 to 100 percent [chance that] we are going to be 'noes' regardless of the substance of the bill." *Congressional Record*, vol. 154, June 24, 2008, p. H5905.

Constraints on the Deliberative Process

What constitutes good public policy is often unclear but it is more likely to be achieved through a deliberative, or reasoned, process where all major issues and views are debated and discussed. A conference process that involves lawmakers with specialized expertise from both parties and both chambers arguably provides for a wider range of interests and preferences to be considered and debated. The amendments (the bicameral compromises) that are ping ponged between the houses are usually crafted in private by a relatively small number of Members, largely from the majority party. To be sure, once these privately negotiated House amendments or Senate amendments to legislation are taken up in each chamber, there is generally time for lawmakers to debate and amend the bicameral accords.[95] The deliberative process, however, could be constrained in the House by special rules from the Rules Committee or in the Senate by tree-filling: offering all the amendatory motions that can be pending at one time.

The two chambers and the two parties have their differences, but a rigorous and vigorous exchange of views in a conference setting might better—compared with the exchange of amendments method—expose weaknesses in the legislation, promote thorough analysis, generate bipartisan support, or encourage consideration of new ideas and perspectives. In the judgment of a senior House minority member, bypassing the conference stage increases the likelihood that you "get legislation that is not well thought out because it hasn't been tugged and hauled [by] all sides."[96] Needless to say, conference committees are not always models of inclusiveness and the wide-ranging examination of alternatives.[97]

Avoidance of Political/Procedural Concerns

Sharp partisanship, particularly since the mid-1990s, has been resurgent on Capitol Hill for reasons highlighted in the previous discussion on polarization. Close elections, narrow margins of control in each chamber, and significant policy differences are among the factors that influence the political/procedural actions of House and Senate members and party leaders. House and Senate majority leaders, as a result, have an incentive to counter minority party actions aimed at forcing vulnerable majority party lawmakers to cast tough votes that might cause them electoral difficulties in the next election. The next two parts of this section highlight several formal House and Senate procedural rules governing conference committees that majority party leaders might want to avoid or circumvent because of political concerns.

House

After the House has agreed to go to conference but before the conferees are officially named by the Speaker, the chamber may adoption a *motion to instruct* their conferees (for example, to uphold the House's position on a certain policy issue). A member of the minority party is granted

[95] A recent example of extensive debate associated with the amendment exchange procedure is the Foreclosure Prevention Act (H.R. 3221). The Senate, for example, engaged in considerable debating and amending of the motion to concur in the amendments of the House to the amendments of the Senate to the foreclosure bill. As the Senate minority leader stated: "We are going to have an opportunity ... to legislate like the Senate has long been accustomed to legislating. We are actually going to offer amendments. They are going to be related to the bill, and we are going to get started." *Congressional Record*, vol. 154, June 18, 2008, p. S5741. See Emily Pierce, "Senate Turns to Legislating on Housing Bill," *The Hill*, June 23, 2008, p. 18.

[96] Carl Hulse, "In Conference: Process Undone By Partisanship," *New York Times*, September 26, 2007, p. A23.

[97] See, for example, Stephen D. Van Beek, *Post-Passage Politics: Bicameral Resolution in Congress* (Pittsburgh: University of Pittsburgh Press, 1995) and Lawrence D. Longley and Walter J. Oleszek, *Bicameral Politics: Conference Committees in Congress* (New Haven, Conn.: Yale University Press, 1989).

priority to offer this motion and only one can be made at this stage. Instructions are nonbinding on the soon-to-be named conferees, but they do serve various purposes. One of these is political. Instruction motions can be framed to force votes on "hot button" issues that could cause electoral problems for majority party members who hold closely contested seats. Furthermore, if a conference cannot reach agreement within 20 calendar days and ten legislative days, then an unlimited number of motions to instruct are in order. Minority party members can offer repetitive motions to instruct so as to compel votes on their election-year and political priorities. (Party leaders sometimes avoid this issue by delaying the appointment of conferees until the pre-conference negotiations are near completion.)

The House might also take steps to recommit the conference report with instructions if the other body has not discharged its conferees by acting first and favorably on the conference report. A minority party Member is given priority by the Speaker to offer the motion to recommit the conference report with instructions, which might be drafted to require a vote on a single isolated issue that might cause political "heartburn" for the majority party. There are no motions to instruct with the ping pong method.

The ping pong method also disallows use of the motion to recommit with respect to House or Senate amendments to legislation. During the initial consideration of bills or joint resolutions, the minority leader, or his designee, is guaranteed the right to offer a motion to recommit by House Rule XIII, clause 6. The minority party's right to offer the recommital motion does not apply under Rule XIII "to a Senate bill or resolution for which the text of a House-passed measure has been substituted." It further does not apply to amendments between the houses, such as a House amendment to a Senate amendment as was the case mentioned earlier with respect to H.R. 6 (the energy bill.)

Motions to recommit measures during their initial floor consideration are of two types: simple (return a bill or joint resolution to committee) or with instructions (the minority party's policy alternative which the full House votes upon.) Recent Congresses have witnessed use of the motion to recommit with instructions to compel vulnerable majority party members to vote on minority-crafted alternatives that, if adopted, might undermine the core intent of the legislation and/or provoke political problems back home for majority party lawmakers. In the 110th Congress, for example, since "switching to the minority, Republicans have launched a coordinated effort to use recommital motions to force Democrats to cast uncomfortable votes or make unwelcome changes to bills."[98] The "House amendments to Senate-passed bills" approach avoids potential procedural maneuvers associated with artfully worded recommittal motions and attendant political headaches for the majority leadership.

Another House rule that applies to conference reports but not to the exchange of amendment procedure involves *earmarks*. Earmarks, in brief, are provisions often included in appropriations bills or their accompanying committee reports that set aside specific funds for projects or programs in Members' districts. They are also included in other types of measures. Earmarks have been a source of controversy in recent years because of their increase in both number and cost, not to mention scandals associated with their use.

[98] Kathleen Hunter, GOP Continues to Vex Democrats on Procedure," *CQ Today*, November 7, 2007, p. 30. Under House Rule XIII, clause 6(c), the Rules Committee is not to report a special rule "that would prevent the motion to recommit a bill or joint resolution from being made," including one offered by the minority leader or his designee. However, the Rules Committee may report "special rules precluding a motion to recommit at subsequent stages; that is, during consideration of amendments between the Houses." See Wm. Holmes Brown and Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington, GPO, 2003), p. 813.

Under House rules, conference reports are not to be considered unless they and their accompanying joint explanatory statements include a list of congressional earmarks and their sponsors. This House rule (Rule XXI, clause 9) does not apply to amendments between the houses. Lamented one House member, the "point of order that I would have liked to have raised against the provisions that may include earmarks [do not] lie against the bill because it is not a conference report, because it's a House amendment to a Senate amendment."[99]

Senate

The threat of a filibuster potentially influences nearly everything that the Senate does, including amendments between the chambers. These amendments are also subject to filibusters and nonrelevant amendments, unless cloture is invoked or limits are placed on both the debate and amendment process by unanimous consent agreements. However, if the political circumstances are right and the House and Senate majority leadership is involved and committed, as in the case of energy, ethics and lobbying, and SCHIP, then the odds favor action rather than inaction with the ping pong method. There are, it seems, fewer procedural obstacles to overcome with the exchange of amendment procedure compared to convening conference committees. As a Senate parliamentary expert pointed out, "Notwithstanding these potential difficulties [filibusters and an uncontrolled amendment process], the use of amendments between the houses can ... be highly efficient" in achieving bicameral compromises.[100]

New rules affecting conference reports—but not the exchange of amendment procedure—were adopted by the 110th Senate.[101] One of the changes provided for enhanced enforcement of an existing Senate rule (Rule XXVIII), prohibiting the "airdropping" of items into conference reports. "Air drops" are measures or matters inserted into conference reports without first being enacted by the House or Senate. These are considered violations of "*scope*," a parliamentary principle which also applies to the House.

In brief, scope means that conferees are to consider only the matters in disagreement between the chambers, they are not to include new matter, nor are they to delete matter agreed to by both chambers. Under the previous Rule XXVIII, a scope point of order upheld by the presiding officer would effectively kill the conference report. Under the revised Senate rule, if a point of order is sustained against airdropped items, that does result in rejection of the conference report, *but* the offending material is deleted and the remaining matter can be returned to the House for its consideration using the exchange of amendment procedure.

For example, when a Rule XXVIII point of order was raised against a conference report for first time under the new procedure, it was sustained by the presiding officer. He then stated: "Under the rule, the Senate now considers the question of whether the Senate should recede from its amendment to the House bill and concur with a further amendment [the conference report minus the offending material]."[102] The Senate agreed to the motion put by the presiding officer.

The Senate also created a brand new rule (Rule XLIV). A key feature of this rule is the public disclosure of *earmarks*. Before a conference report can be considered, sponsors of earmarks must

[99] *Congressional Record*, vol. 153, December 6, 2007, p. H14257.

[100] Martin B. Gold, *Senate Procedure and Practice* (New York: Rowman & Littlefield Publishers, Inc., 2004), p. 121.

[101] CRS Report RS22733, *Senate Rules Changes in the 110th Congress Affecting Restrictions on the Content of Conference Reports*, by Elizabeth Rybicki.

[102] *Congressional Record*, vol. 153, November 7, 2007, p. S14043. There was an unsuccessful attempt to waive the ruling of the presiding officer by the required 60 votes of the Senate.

be identified through lists, charts, or other means and made publicly available on a congressional website for at least 48 hours. The majority leader or appropriate committee chair must certify (in a statement on the Senate floor, for example) that these requirements have been met before it is in order to vote on a conference report.

Rule XLIV also permits a Senator to "raise a point of order against one or more provisions of a conference report if they constitute new directed spending provisions" which are "targeted to a specific State, locality, or Congressional district, other than through a statutory or administrative formula-driven or competitive award process."[103] Worth noting is that paragraph 8 of Rule XLIV applies to discretionary and mandatory spending and not to authorizations of appropriations. The point of discussing these two rule changes—the revisions to Rule XXVIII and the new Rule XLIV—is to underscore that amendments between the houses are not subject to their formal procedures and requirements.[104]

Lack of Transparency

Private negotiations among a limited number of participants is a fundamental characteristic of bicameral negotiations on major bills. As for the amendment exchange method, transparency and open deliberations are minimized if combined with a special rule limiting amendments in the House and tree-filling in the Senate, which closes off amendment opportunities for Members. Unlike the joint explanatory statement accompanying a conference report, there is no required public "paper trail" or written record of the decisions made during the informally negotiated amendment exchange procedure, except for whatever material is spread on the record during House and Senate floor debate. There are also no layover requirements for the exchange of amendment procedure, but there are for conference reports. Layover rules give Members an opportunity to read about the decisions made in a conference committee prior to floor action. Layover rules, however, may be waived by special rules from the House Rules Committee and the need for cloture provides Senators with the opportunity to read the amendments associated with the ping pong method. Still, the conference route seems to provide the potential for more openness and transparency compared to the ping pong method. Three reasons buttress this assessment.

First, conference committees produce two formal products that are publicly available: the conference report (the legal language) and the joint explanatory statement (an explanation of the conference report). Under House rules (Rule XIII, clause 7), the "joint explanatory statement shall be sufficiently detailed and explicit to inform the House [and Senate] of the effects of the report on the matters committed to conference." Conference reports and joint explanatory statements are printed in the *Congressional Record*. Joint explanatory statements are not required by the exchange of amendments procedure. (However, there are examples of ping ponged

[103] Senate Rule XLIV provides a detailed definition of what constitutes a "congressionally directed spending item." It also establishes a procedure for waiving any or all points of order raised against a conference report under this Senate rule.

[104] For further information on the House and Senate's earmark reforms, see CRS Report RL34462, *House and Senate Procedural Rules Concerning Earmark Disclosure*, by Sandy Streeter; CRS Report RS22733, *Senate Rules Changes in the 110th Congress Affecting Restrictions on the Content of Conference Reports*, by Elizabeth Rybicki; CRS Report RS22867, *Earmark Disclosure Rules in the Senate: Member and Committee Requirements*, by Megan Suzanne Lynch; and CRS Report RS22866, *Earmark Disclosure Rules in the House: Member and Committee Requirements*, by Megan Suzanne Lynch.

measures where something akin to a joint explanatory statement is printed in the *Congressional Record*, as in the case of S. 1, the Honest Leadership and Open Government Act).[105]

Second, House and Senate rules stipulate that meetings of conference committees shall be open to the public; these rules also identify the procedures for closing the public sessions. To emphasize their commitment to open conferences, the majority leaders of each chamber pledged that conferences in the 110th Congress would be open to public observation.[106] In Section 515 of the Honest Leadership and Open Government Act (P.L. 110-81), the Senate agreed to the following protocol: "conference committees should hold regular, formal meetings of all conferees that are open to the public." If there is a presumption of openness for conference committees, there is nothing comparable for the private negotiating sessions associated with the ping pong method.

Third, transparency of conference proceedings can sometimes be an important strategic component of the lawmaking process. Televising conferences over C-SPAN (the Cable Satellite Public Affairs Network), which has occurred several times in recent years, could be part of the strategy for influencing conference decisionmaking by generating public opinion for or against particular issues.

In at least one instance, according to the House chair of a conference committee, the entire proceedings were open to public view. As the chair stated, this was the first tax conference in his memory that was held "entirely with the public permitted complete access, televised over the internal television [network] for the entire time of the conference. There were no separate conference meetings. All of the conference meetings were public."[107] The chair of the Senate conferees agreed with this assessment. On tax conferences, he said, nearly "all of the toughest decisions come down to private negotiations between the two chairmen.... In this conference, however, all discussions were aired publicly."[108] The rationale for complete openness was to blunt any allegations from opponents that untoward deals were being made in secret. There have been no instances of television coverage of the private negotiations associated with the ping pong method.

Concluding Observations

Although **Table 1** does not reflect a numerical increase in the ping pong method, its recent use on major bills is something that does seem significant. Volleying amendments between the houses on consequential legislation is outside what might be considered the "regular order"—the creation of a conference committee, the usual venue for reconciling bicameral differences on major measures. As a result, there are at least five issues associated with ping ponging that merit discussion.

First, the more prominent role of ping ponging may reflect the gradual institutionalization of a leadership-influenced bicameral bargaining process that has been evolving for several years. Bicameral bargaining is not a static process; it has undergone many changes over the years. The "old" conference style, where a limited number of conferees from a single committee in each chamber haggle over inter-chamber differences, no longer suffices as the prime method for reaching bicameral compromises. Today, party leaders exercise large influence in achieving and coordinating inter-chamber agreement on major bills, often resorting to the ping pong method for

[105] *Congressional Record*, vol. 153, August 2, 2007, pp. S10708-S10714.

[106] See Lynn Sweet, "New Congress, New Rules," *The Hill*, December 7, 2006, p. 27 and Erin Billings and Emily Pierce, "Reid Prepares for Senate Changeover," *Roll Call*, November 9, 2006, on-line edition.

[107] *Congressional Record*, vol. 150, October 7, 2004, p. H8656.

[108] *Congressional Record*, vol. 150, October 9, 2004, p. S10929.

this purpose. The bicameral role of party leaders results from various developments, such as the need to mobilize support for party-preferred policies from a diverse array of engaged actors (interest groups, executive officials, nonconferee lawmakers, bloggers, and so on.)

Second, there is arguably little significant difference between convening "virtual" conferences, where bicameral compromises are worked out in private among key lawmakers, and employing the amendment exchange method where inter-chamber accords are also hammered out in closed meetings by a select number of House and Senate leaders. There are differences, however. The threat or reality of a filibuster in today's Senate appears so severe that it has produced a changed bicameral dynamic for reconciling House-Senate differences on legislation. Further, there are numerous House and Senate rules and practices triggered by the conference method that can be avoided by the ping pong approach. These include such things as potential controversies involving conferee selection, the instruction of conferees, or scope violations.

Third, the bargaining dynamic associated with ping ponging may have its roots in Senate developments that have occurred over several decades. The thrust of these changes has led to a more individualistic and partisan Senate where lawmakers' individual or partisan preferences sometimes take precedence over institutional requirements. Congressional scholars have examined how the Senate has changed over several decades, and these changes influence today's conferee appointment process. A capsule summary might include the following developments.

During the 1970s, there was an increase in the number of filibusters and other delaying tactics as the chamber witnessed a heightened sense of influence on the part of each Senator. Many Senators, regardless of party, were more willing to employ their formidable parliamentary prerogatives to advance individual goals even if that meant blocking the Senate's business or foiling the agenda-setting authority of the majority leader. Professor Richard F. Fenno, Jr., a noted legislative scholar, studied how the 1950s Senate evolved from a "communitarian" institution, where Members were expected to use filibusters sparingly and only for high-stakes national issues, to today's "individualistic" Senate. He found that with "more openness, more media visibility, more candidate-centered elections," more interest groups, more political obligations, and more staff, Members became independent entrepreneurs unwilling to submerge their personal and political objectives "to the norms of any collectivity."[109]

By the late 1980s and 1990s, the Senate seemed to become increasingly contentious, "with polarization along partisan and ideological lines that largely coincide."[110] This pattern continued into the 2000s. Given any lawmaker's ability to stall legislative action, and a narrowly divided chamber's oft-inability to invoke cloture, it became much more difficult for the Senate to convene conference committees. As a result, majority party leaders in both houses turned to amendment exchanges and informal negotiations to iron out bicameral differences. This negotiating pattern has persisted in recent years regardless of which party has been in charge of the Congress.

Fourth, bypassing the conference stage is not without its own complications. A brief summary of a 2008 housing measure (H.R. 3221) will help make the point. Remember that the aforementioned H.R. 3221 started out as an energy bill with many of its provisions folded into H.R. 6 (the energy case example) during the exchange of amendments between the chambers. The bill remained in the Senate, however, and became the vehicle to carry a major housing initiative. The Senate devised a package of housing proposals that contained energy tax incentives and, as mentioned before, the Constitution requires the House to originate tax measures. So the Senate

[109] Richard F. Fenno, Jr., "The Senate Through the Looking Glass: The Debate over Television," *Legislative Studies Quarterly*, August 1989, p. 316.

[110] Barbara Sinclair, *Party Wars*, p. xvi.

deleted the legislative text contained in H.R. 3221 and replaced it with housing and energy-relevant proposals. The legislation passed the Senate on April 10, 2008, as a Senate amendment to H.R. 3221. The amended bill was returned to the House, including with a new title (the "Foreclosure Prevention Act").[111]

On May 7, 2008, the House Rules Committee reported a procedural resolution (H.Res. 1175) that made it in order for the House to take up H.R. 3221, with the Senate amendments thereto. Worth underscoring are two points: first, Senate amendments to House-passed measures lack privilege—an automatic right to the floor—and require a special rule for this purpose; second, the House can respond to Senate amendments in any way that it wants. In this case, the special rule permitted the Financial Services chair to make a motion to concur in the Senate amendments with three House amendments. All three were adopted by the House, along with an amended title.[112] H.R. 3221 became the "American Housing Rescue and Foreclosure Prevention Act," and was volleyed back to the Senate (the three House amendments to the Senate amendments to H.R. 3221).

Things quickly became procedurally complicated in the Senate, leading to complex parliamentary maneuvers. There were three motions for cloture; an unsuccessful motion to refer the House amendments to the Banking Committee; tree-filling by the majority leader; controversy over whether an amendment involving energy tax incentives was germane to the housing bill; multiple amendments offered to the House amendments; and other procedural twists and turns. In brief, consideration of House amendments in the Senate provides numerous opportunities for delay and produces complications that are procedurally and politically complex.

The Senate finally cleared all the procedural hurdles, and the housing bill, as amended—renamed the "Housing and Economic Recovery Act"—was returned to the other body for its consideration of the Senate amendments to the House amendments to the Senate amendments to H.R. 3221. House negotiators returned to the drawing board to develop a housing package (another House amendment(s)—technically a third-degree amendment violation[113]) that the Senate could accept and thus end the back-and-forth volley of proposals. To be sure, the respective House and Senate chairs were in regular communication, working together to develop a housing package (the new House amendment) that could pass the Senate.[114] In the end, the House on July 23 agreed to the inter-chamber negotiated compromise, which included provisions addressing housing foreclosures and credit markets, by a 272 to 152 vote. Three days later, after the filing of cloture and tree-filling by the Senate majority leader, the chamber voted 72 to 13 to concur in the

[111] *Congressional Record*, vol. 154, April 10, 2008, p. S2844.

[112] *Congressional Record*, vol. 154, May 7, 2008, p. H3134 and May 8, pp. H3219-H3282.

[113] Both chambers prohibit amendments in the third degree, meaning an amendment to an amendment to an amendment. The third-degree prohibition applies to amendments between the houses. "In short, after each chamber has passed the same bill for the first time (for example, the House passes a House bill and the Senate passes the House bill with Senate amendments), each chamber may have one opportunity to amend the amendments of the other chamber." See Senate Committee on Rules and Administration, *Congressional Handbook* (Washington, DC: GPO, 1994), p. III-30.

[114] Another financial crisis hit the housing market upon H.R. 3221's return to the House. Two large government-sponsored mortgage enterprises called Fannie Mae and Freddie Mac encountered serious problems involving the lack of capital to cover their outstanding obligations. As a result, there was thought of folding a Treasury Department funding initiative to aid the two mortgage institutions into the housing bill, a "one vote, one package" strategy. See David Rogers, "Frank Plans Quick Passage of Treasury Bill," *Politico*, July 15, 2008, p. 21. In the end, this is what occurred. See Benton Ives, "Mortgage Relief on the Horizon," *CQ Weekly*, July 28, 2008, pp. 2056-2058; Lori Montgomery and Paul Kane, "Housing Bill Won't 'Perform Miracles'," *The Washington Post*, July 27, 2008, p. A1; and "Bush Signs Housing Assistance, Oversight Legislation Without Fanfare," *Daily Report for Executives*, July 31, 2008, p. A-2.

amendment of the House.[115] On July 30, the legislation was signed into law (P.L. 110-289) by the President.

Lastly, the history of Congress is the history of change. Lawmaking processes adapt in big and little ways to new pressures, actors, and events. Yet one constant is that both chambers must pass a measure in absolutely identical fashion before it can be sent to the White House for presidential consideration. Recall that **Table 1** provides data on the methods used to secure bicameral concurrence on legislation. What the table cannot reveal is that many respected individuals believe that a once little-discussed method—the exchange of amendments between the houses—recently has taken on larger importance in reconciling House-Senate differences on major legislation. Whether this development is an anomaly, unique to recent Congresses, or reflects the wave of the future is not clear. Prediction is very hard, Yogi Berra is reputed to have said, especially about the future. One thing does seem certain, however. If there are continuing issues in convening conference committees, or circumstances warrant their calculated circumvention, institutional leaders seem certain to employ the ping pong method or devise other ways to resolve bicameral differences on legislation.

Author Information

Walter J. Oleszek
Senior Specialist in American National Government

Disclaimer

[115] *Congressional Record*, vol. 154, July 26, 2008, p. S7506. Technically, the Senate agreed to the motion to concur in the amendment of the House to the Senate amendment to the House amendments to the Senate amendment to H.R. 3221.